FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Via Email and First Class Mail

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JUN - 1 2016

RE: MUR 6566
Brian Foley

Dear Mr. DeVito:

On November 5, 2015, the Federal Election Commission (the "Commission") notified your client, Brian Foley, of information indicating that he may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided your client with the available information and copies of the complaints giving rise to this matter.

After reviewing the available information and your client's response, the Commission, on May 24, 2016, found reason to believe that your client knowingly and willfully violated 52 U.S.C. §§ 30116(a) and 30122 by making contributions in the name of another, and violated 52 U.S.C. § 30116(a) by making a $500,000 excessive contribution to Lisa Wilson-Foley and her committee, Lisa Wilson-Foley for Congress. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations, but is a voluntary step in the enforcement process that the Commission is offering to your client as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your client violated the law.

If your client is interested in engaging in pre-probable cause conciliation, please contact Meredith McCoy, the attorney assigned to this matter, at (202) 694-1609, within 7 days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within 60 days. *See* 52 U.S.C. § 30109(a); 11 C.F.R. Part 111 (Subpart A). Conversely, if your client is not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

In the meantime, this matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.[1]

We look forward to your response.

On behalf of the Commission,

Matthew Petersen
Chairman

Enclosures
Factual and Legal Analysis

[1] The Commission has the statutory authority to refer knowing and willful violations of the Act to the U.S. Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENT: Brian Foley MUR: 6566

4 **I. INTRODUCTION**

5 For the reasons discussed below, the Commission finds reason to believe Brian Foley:
6 (1) knowingly and willfully violated 52 U.S.C. §§ 30116(a) and 30122 by making contributions
7 in the names of four individuals, which resulted in an excessive contribution; and (2) violated
8 52 U.S.C. § 30116(a) by giving Lisa Wilson-Foley, his spouse, $500,000 to contribute to her
9 principal campaign committee, Lisa Wilson-Foley for Congress ("the Committee").

10 **II. BACKGROUND**

11 In the course of related criminal proceedings, Foley testified at the September 2014 trial
12 of former Connecticut Governor John Rowland.[1] Based on Foley's testimony, and additional
13 information available to the Commission, as discussed in detail below, the Commission notified
14 Foley as a respondent and gave him the opportunity to respond.[2] Foley responded after a
15 substantial extension, for which he provided an agreement tolling of the statute of limitations.[3]

16 **III. FACTUAL AND LEGAL ANALYSIS**

17 **A. Foley Knowingly and Willfully Violated 52 U.S.C. §§ 30116(a) and 30122 by**
18 **Reimbursing Four Individuals for Contributions to the Committee**

19 The available information indicates that Foley reimbursed campaign contributions made
20 by four individuals: (1) his sister and employee, Patricia Hyyppa; (2) his niece, Patricia's
21 daughter, Johanna Hyyppa; (3) his nephew and employee, Jeremy Vearil; and (4) his childhood

1 *United States v. Rowland*, No. 3:14-CR-79 (D. Conn. Sept. 5, 2014).

2 *See* Notification to Brian Foley, MUR 6566 (Nov. 5, 2015).

3 Consent to Extend the Time to Institute a Civil Law Enf. Suit, MUR 6566 (Foley) (Dec. 22, 2015) (tolling the statute of limitations for 120 calendar days).

friend and employee, Kenneth Lewis. According to the Committee's disclosure reports, the Hyyppas, Vearil, and Lewis each contributed the maximum $2,500 to the Committee for the nominating convention and the primary and general elections, resulting in total contributions of $7,500 per person.[4] The available information indicates that Foley gave these individuals the money to make contributions to the Committee.

When Foley testified for the government at Rowland's trial, he was asked about the four contributions. He testified that he had "understandings" with the Hyyppas, Vearil, and Lewis, promising to reimburse each of them if they made contributions to the Committee.[5] With respect to Lewis, for example, Foley told the court, "I had an understanding that if he donated to Lisa's campaign that I would make good on it. . . . In some way reimburse him for it."[6] He testified that he had the same arrangements with Patty Hyyppa, Johanna Hyyppa, and Vearil,[7] and that he did, in fact, reimburse their contributions.[8]

Foley was asked about his understanding of the Act's contribution limits and disclosure requirements at the time of the reimbursements, testifying:

> Q. Did you understand that there was like a maximum amount of donations a person could make [to the Committee]?
> A. Yes.
> Q. What did you understand that to be?
> A. $7,500.
> Q. And did you make the max donation?

[4] In Connecticut, political parties hold nominating conventions prior to the primary and general elections. Thus, in 2012, when the applicable contribution limit was $2,500 per election, the maximum contribution per person was $7,500. With respect to the Hyyppas, Vearil, and Lewis, the $2,500 contributed for the general election was refunded after Wilson-Foley lost the primary election.

[5] Transcript of Record at 179-82, *United States v. Rowland*, No. 3:14-CR-79 (D. Conn. Sept. 5, 2014) (Doc. 158) ("*Rowland* Transcript").

[6] *Id.*

[7] *Id.* at 181.

[8] *Id.* at 215 ("Q: Did you, in fact, reimburse your sister and her daughter for these contributions? A: Yes.").

A. I did.
. . . .
Q. And, Mr. Foley, so you are maxed out at [$]7,500. Did you want to make more contributions to the campaign?
A. Yes.
Q. Did you arrange with other people to make contributions to the campaign?
A. Yes.
. . . .
Q. Mr. Foley, did you think you were allowed to do this?
A. No.
Q. Were any of these payments reported to the FEC?
A. No.[9]

On cross-examination, defense counsel further questioned Foley about his reimbursements and asked, "So did you know that you were engaging in federal criminal wrongdoing when you did this?" Foley responded "Yes."[10]

In 2012, the Act prohibited an individual from making contributions to a candidate which, in the aggregate, exceeded $2,500 per election.[11] The Act further provides that no person shall make a contribution in the name of another or knowingly permit his name to be used to effect such a contribution, and that no person shall knowingly accept a contribution in the name of another.[12] This provision proscribes both "false name" contributions and "straw donor" or "conduit" contributions.[13]

Here, the available information indicates that, after reaching his own contribution limit to the Committee, he arranged for the Hyyppas, Vearil, and Lewis to make additional contributions

[9] *Id.* at 179-82.

[10] *Id.* at 215.

[11] 52 U.S.C. § 30116(a).

[12] 52 U.S.C. § 30122.

[13] *United States v. O'Donnell*, 608 F.3d 546, 549, 553 (9th Cir. 2010).

to his wife's campaign totaling $30,000.[14] Foley made prior arrangements to reimburse each conduit for their respective contributions to the Committee, and later followed through with those reimbursements.[15] By financing the contributions attributed to the Hyyppas, Vearil, and Lewis, Foley made excessive contributions in the names of others.[16]

Despite his sworn testimony, Foley disputes the allegation in his response to the Commission. He states that there is "no information to suggest that any of the individuals referenced did not voluntarily choose to contribute, or that they would not have contributed even if Foley did not make gifts to them."[17] However, the voluntariness of the conduits' contributions does not vitiate the prior agreement that Foley would reimburse them and Foley's subsequent payments to that effect.[18] By pre-arranging to reimburse the Hyyppas, Vearil, and Lewis, Foley established himself the "true source" of their subsequent contributions to the Committee.[19]

[14] *Rowland* Transcript at 180-82, 213-18.

[15] *Id.* at 215.

[16] Foley contributed $2,500 to the Committee on June 9, 2011, and an additional $5,000 on June 16, 2011. Because he thereby contributed the maximum, every additional contribution attributed to Foley is in excess of the limits established under 52 U.S.C. § 30116(a).

[17] Foley Resp. ¶ 3.

[18] *United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015).

[19] *Id.* Foley also asserts that there is no information to show that "the contributions made by these individuals came solely out of funds from Foley." Foley Resp. ¶ 3. Given that Foley does not dispute the information that he reimbursed the conduits, his response suggests that he did not fully reimburse the conduits; however, Foley has not qualified his statements that he provided these four individuals with the funds to make contributions and has not denied that he fully reimbursed the conduits. In the alternative, Foley may be emphasizing that he did not advance the funds, but instead reimbursed the conduits. Nevertheless, the courts and Commission have repeatedly held that an agreement to reimburse conduits — and subsequent reimbursement — has the same effect as advancing funds to an intermediary, and that in each case, the individual who reimburses his conduits is the "true source" of the contribution. *See O'Donnell*, 608 F.3d at 550-51; *see also e.g.*, MUR 6223 (St. John); MUR 5948 (Critical Health Systems); MUR 5849 (Bank of America); MUR 5453 (Giordano, *et al.*).

Moreover, it appears that Foley's conduct may have been knowing and willful.[20] A violation of the Act is considered knowing and willful if the "acts were committed with full knowledge of all the relevant facts and a recognition that the action is prohibited by law."[21] In this matter, Foley told the court that he was aware of the applicable contributions limits and that he nonetheless sought to make additional contributions to the Committee.[22] Foley further testified that he knew this to be a violation of federal law and that he sought to evade detection.[23]

Based on this information, the Commission finds reason to believe Brian Foley knowingly and willfully violated 52 U.S.C. §§ 30116(a) and 30122 by making contributions in the names of four individuals, and in doing so made an excessive contribution to the Committee totaling $30,000.

B. Foley Made an Excessive Contribution in Violation of 52 U.S.C. § 30116(a) by Conveying $500,000 in Separately-Held Assets

During the Rowland trial, Foley testified that he made a $500,000 gift to Lisa Wilson-Foley, his spouse, for use in her campaign. On direct examination, Foley testified, "I understood I could give my wife money directly which she could contribute, but in terms of my contribution to the campaign, I understood I was maxed out at $7,500."[24] During cross-examination, he continued:

> A. I told Lisa when she was going to run for Congress that I would contribute half a million dollars. . . . $500,000.

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[20] *See* 52 U.S.C. § 30109(a)(5)(B), (d).

[21] 122 Cong. Rec. 12,197, 12,199 (May 3, 1976); *see also United States v. Danielcyzk*, 917 F. Supp. 2d 573 (E.D. Va. 2013) (holding that the "knowing and willful" standard does not require a showing that the respondent had knowledge of the specific statute or regulation allegedly violation, just that the respondent "acted voluntarily and was aware that his conduct was unlawful.").

[22] *Rowland* Transcript at 179-80.

[23] *Id.* at 215.

[24] *Id.* at 179-80.

Q. I have no interest in probing into —
A. No, it's okay.
Q. Your private — I'm about to ask a question and I'm prefacing it by saying I'm not interested in your private financial affairs with your wife. But are there joint assets?
A. No.
Q. So they're separate.
A. Our assets are separate, yeah.
Q. So you were going to contribute a half a million bucks?
A. I did. I put [$]500,000 into Lisa's campaign for Congress.
Q. And did Lisa make a substantial contribution on her own?
A. I think she put in about $500,000 as well.
Q. In what form?
A. Just wrote checks to the campaign. And my checks went to Lisa and then she put my money into the campaign.[25]

The Committee's disclosure reports to the Commission show that, to date, Wilson-Foley has made contributions to the Committee totaling $47,756 and loans totaling $960,000.[26]

In response to the Commission's notifications, Foley asserts that his direct testimony shows that he lacked "the requisite intent to establish violations of the Act."[27] He also asserts that there is no information to show that "Lisa Wilson-Foley's contributions to her own campaign came solely and exclusively out of funds provided to her by Foley."[28] He further cites Connecticut law for the proposition that "where marital efforts were expended to maintain or enhance individual accounts, and where portion(s) of individual accounts are used for marital purposes, the accounts are marital assets" and state that this entitles Wilson-Foley "as much right to their use as Foley himself."[29] However, Foley has not provided any additional information

[25] *Id.* at 228-29.

[26] Wilson-Foley made her first loan to the Committee on April 1, 2011; she made her most recent contribution on December 16, 2014.

[27] Foley Resp. ¶ 7.

[28] *Id.* ¶ 8.

[29] *Id.* ¶ 8 (citing *Murphy v. Murphy*, 2001 WL 1420600 (Conn. Sup. Ct. 2001)).

about the source of the $500,000 or any information to indicate that these assets were "enhance[d]" by "marital efforts" or "used for marital purposes."

As referenced above, in 2012 the Act prohibited persons from making contributions in excess of $2,500 to any candidate and his or her authorized political committee with respect to any election for federal office.[30] The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[31]

Federal candidates may make unlimited contributions from their "personal funds" to their campaigns.[32] "Personal funds" of a candidate means the sum of all of the following: (a) assets; (b) income; and (c) jointly owned assets.[33] A candidate's assets are amounts derived from any asset that, under applicable state law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had legal and rightful title or an equitable interest.[34] A candidate's jointly owned assets are amounts derived from a portion of assets that are owned jointly by the candidate and the candidate's spouse as follows: the portion of assets that is equal to the candidate's share of the asset under the

[30] 52 U.S.C. § 30116(a)(1)(A).

[31] *Id.* § 30101(8)(A)(i).

[32] 11 C.F.R. § 110.10.

[33] *Id.* § 100.33. A candidate's income consists of income received during the current election cycle, of the candidate, including: salary and other earned income that the candidate earns from bona fide employment; income from the candidate's stocks or other investments including interest, dividends, or proceeds from the sale or liquidation of such stocks or investments; bequests to the candidate; income from trusts established before the beginning of the election cycle; income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary; gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and proceeds from lotteries and similar games of chance. *Id.* § 100.33(b).

[34] *Id.* § 100.33(a).

instrument of ownership or conveyance; or if no specific share is indicated by an instrument of ownership or conveyance, the value of one-half of the property.[35]

Although federal candidates may contribute unlimited personal funds to their campaigns, their family members are subject to the Act's contribution limits.[36] The Commission has enforced the contribution limit against family members who made excessive contributions to the candidate's campaign in the form of asset transfers to the candidate.[37]

Here, Foley testified at trial that he and his wife have separate assets and that he transferred $500,000 of his own assets to her to contribute to her campaign.[38] He testified that Wilson-Foley used that money, along with approximately $500,000 of her own separate assets, to write checks to her campaign.[39] Indeed, the Committee's disclosure reports show that, to date, Wilson-Foley has made contributions to the Committee totaling $47,756.20 and loans totaling $960,000.[40]

Because it appears Foley transferred funds to Wilson-Foley after she became a candidate, the transferred funds do not qualify as Wilson-Foley's assets under 11 C.F.R. § 100.33(a). Because the funds he transferred were separate and not held in a joint account, the transferred

[35] *Id.* § 100.33(c).

[36] The United States Supreme Court has upheld the constitutionality of the Act's contribution limits as applied to members of a candidate's family. *See Buckley v. Valeo*, 424 U.S. 1, 53 n.59 ("Although the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily members.").

[37] *See, e.g.*, MUR 6417 (Huffman) (finding reason to believe a candidate and his spouse violated 52 U.S.C. § 30116(a) and (f) by transferring $900,000 from the spouse's separately-held trust account to the couple's joint account to be loaned to the candidate's campaign and transferring $400,000 from the spouse's separately-held trust account directly to the candidate's campaign); MUR 5334 (O'Grady) (finding reason to believe a candidate and her spouse violated 52 U.S.C. § 30116(a) and (f) by making and accepting a $25,000 loan from the spouse's separate business account).

[38] *Rowland* Transcript at 228-29.

[39] *Id.* ("[M]y checks went to Lisa and then she put my money into the campaign").

[40] The Committee has not repaid any of Wilson-Foley's loans.

funds were not jointly owned assets under 11 C.F.R. § 100.33(c). Given Foley's testimony that he made the contribution from separately held assets, and that "[his] checks went to Lisa and then she put [his] money into the campaign,"[41] the $500,000 at issue does not appear to qualify as Wilson-Foley's personal funds. Instead, Foley's conveyance appears to be an excessive contribution in violation of the Act. Accordingly, the Commission finds reason to believe Brian Foley violated 52 U.S.C. § 30116(a) by giving Wilson-Foley a $500,000 contribution from his separately-held assets.

[41] *Rowland* Transcript at 230. In his response, Foley asserts that Connecticut law considers individual accounts to be marital assets where "portion(s) of individual accounts are used for marital purposes." Foley Resp. ¶ 8 (citing *Murphy v. Murphy*, 2001 WL 1420600 (Conn. Sup. Ct. 2001)).

Connecticut law appears to allow courts broad discretion in classifying and reallocating the property of spouses, allowing courts to consider numerous factors, including the contribution of each party in the acquisition, preservation or appreciation in value of their respective estates. CONN. GEN. STAT. § 46b-81 ("At the time of entering a decree annulling or dissolving a marriage...the Superior Court may assign to either the husband or wife all or any part of the estate of the other"). However, in granting broad discretion, the state does not appear to mandate any particular classification. *See, e.g., De Repentigny v. De Repentigny*, 121 Conn. App. 451, 461-62 (Conn. App. 2010) ("[A]lthough both parties made contributions to the acquisition, maintenance and reservation of this asset, the evidence clearly supports a finding that the defendant's contribution was significantly greater...we will not second-guess the court's decision to grant ownership of [the asset] to the defendant."). Regardless, the available information does not support the conclusion that Foley and Wilson-Foley indeed shared in their use and maintenance of the account in question. To the contrary, Foley testified at trial that their assets are separate and that his $500,000 conveyance to Wilson-Foley came from his separate account.